

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SARAH E. MCKINNEY, )  
Plaintiff, ) No. CV-06-3036-MWL  
v. ) ORDER GRANTING DEFENDANT'S  
JO ANNE B. BARNHART, ) MOTION FOR SUMMARY JUDGMENT  
Commissioner of Social )  
Security, )  
Defendant. )  
)

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BEFORE THE COURT are cross-motions for summary judgment,  
noted for hearing without oral argument on October 30, 2006. (Ct.  
Rec. 12, 17). Plaintiff Sarah McKinney ("Plaintiff") filed a  
reply brief on October 2, 2006. (Ct. Rec. 19). Attorney Kathryn  
Tassinari, appearing pro hac vice (Ct. Rec. 16), represents  
Plaintiff; Special Assistant United States Attorney Carol A. Hoch  
represents the Commissioner of Social Security ("Commissioner").  
The parties have consented to proceed before a magistrate judge.  
(Ct. Rec. 11). After reviewing the administrative record and the  
briefs filed by the parties, the Court **GRANTS** Defendant's Motion  
for Summary Judgment (Ct. Rec. 17) and **DENIES** Plaintiff's Motion  
for Summary Judgment (Ct. Rec. 12).

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## JURISDICTION

2 On December 18, 2001, Plaintiff filed an application for  
3 Supplemental Security Income ("SSI") benefits, alleging disability  
4 since October 19, 2001, due to residual limitations stemming from  
5 a left hip fracture and a right hand injury. (Administrative  
6 Record ("AR") 128-131, 163). Plaintiff's application for SSI was  
7 denied initially and on reconsideration.

On September 2, 2004, Plaintiff appeared before Administrative Law Judge ("ALJ") James Caulfield, at which time testimony was taken from Plaintiff and vocational expert Jeffrey Tittlefitz. (AR 45-101). On March 17, 2005, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 15-24). The Appeals Council denied a request for review on February 22, 2006. (AR 7-10). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on April 26, 2006. (Ct. Rec. 1).

**STATEMENT OF FACTS**

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 55 years old on the date of the ALJ's decision, earned a GED and has past work experience as a janitor, maid, food service worker, laundry room worker and dubbing machine operator. (AR 16, 164). Plaintiff indicated that she stopped working on October 19, 2001, the alleged onset date of disability, because she "[g]ot laid off, couldnt [sic] perform my job duties to my ability." (AR 163).

1 Plaintiff testified at the administrative hearing held on  
2 September 2, 2004, that she last worked in October of 2001 as a  
3 janitor for a four-month period. (AR 54). She indicated that she  
4 worked full-time cleaning buildings, and the work consisted of  
5 sweeping, vacuuming, emptying garbage cans, cleaning bathrooms and  
6 wiping down desks, doors and mirrors in the offices. (AR 54-55,  
7 85). She stated that the job ended, and she was laid off, due to  
8 lack of work, but she also indicated that she could no longer keep  
9 up with the work demand due to her physical condition. (AR 55,  
10 56).

11 Plaintiff described her hip pain as pain which extends from  
12 her hip into her groin and back of her leg when she overdoes it.  
13 (AR 59). She indicated that housework, driving and walking, as  
14 well as her work as a janitor, would be overdoing it. (AR 59).  
15 She testified that, in October of 2001, she could be on her feet  
16 for about 45 minutes before the pain would spread down her leg.  
17 (AR 60). After 45 minutes she would need to take a 10 minute  
18 break off her feet. (AR 60). At the time of the administrative  
19 hearing, Plaintiff indicated that she could only be on her feet  
20 for 25 to 30 minutes at a time. (AR 61-62). Plaintiff stated  
21 that she also has pain when sitting, stemming from a 1995  
22 automobile accident, and could sit no more than 30 minutes before  
23 having a problem. (AR 67-68). When asked how long she could go  
24 during an eight-hour day by alternating at will between sitting  
25 and standing, Plaintiff indicated she could go about three and  
26 one-half hours. (AR 96-97).

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1 Plaintiff testified that she continues to do housework,  
2 including vacuuming, sweeping, laundry and dishwashing. (AR 68).  
3 She stated that each day she spends four to five hours doing her  
4 housework. (AR 68).

5 **SEQUENTIAL EVALUATION PROCESS**

6 The Social Security Act (the "Act") defines "disability" as  
7 the "inability to engage in any substantial gainful activity by  
8 reason of any medically determinable physical or mental impairment  
9 which can be expected to result in death or which has lasted or  
10 can be expected to last for a continuous period of not less than  
11 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
12 Act also provides that a Plaintiff shall be determined to be under  
13 a disability only if his impairments are of such severity that  
14 Plaintiff is not only unable to do his previous work but cannot,  
15 considering Plaintiff's age, education and work experiences,  
16 engage in any other substantial gainful work which exists in the  
17 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
18 Thus, the definition of disability consists of both medical and  
19 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
20 (9<sup>th</sup> Cir. 2001).

21 The Commissioner has established a five-step sequential  
22 evaluation process for determining whether a person is disabled.  
23 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is  
24 engaged in substantial gainful activities. If he is, benefits are  
25 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the  
26 decision maker proceeds to step two, which determines whether  
27 Plaintiff has a medically severe impairment or combination of  
28 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

If Plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares Plaintiff's impairment with a number of listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed impairments, Plaintiff is conclusively presumed to be disabled. If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the fourth step, which determines whether the impairment prevents Plaintiff from performing work he has performed in the past. If Plaintiff is able to perform his previous work, he is not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff cannot perform this work, the fifth and final step in the process determines whether Plaintiff is able to perform other work in the national economy in view of his residual functional capacity and his age, education and past work experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

The initial burden of proof rests upon Plaintiff to establish a *prima facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once Plaintiff establishes that a physical or mental impairment prevents him from engaging in his previous occupation. The burden then shifts to the Commissioner to show (1) that Plaintiff can perform other substantial gainful activity and (2) that a "significant number of jobs exist in the national economy"

1 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498  
 2 (9<sup>th</sup> Cir. 1984).

3 **STANDARD OF REVIEW**

4 Congress has provided a limited scope of judicial review of a  
 5 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold  
 6 the Commissioner's decision, made through an ALJ, when the  
 7 determination is not based on legal error and is supported by  
 8 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995  
 9 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
 10 1999). "The [Commissioner's] determination that a plaintiff is  
 11 not disabled will be upheld if the findings of fact are supported  
 12 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572  
 13 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence  
 14 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d  
 15 1112, 1119 n.10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
 16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
 17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
 18 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
 19 evidence as a reasonable mind might accept as adequate to support  
 20 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 21 (citations omitted). "[S]uch inferences and conclusions as the  
 22 [Commissioner] may reasonably draw from the evidence" will also be  
 23 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
 24 On review, the court considers the record as a whole, not just the  
 25 evidence supporting the decision of the Commissioner. *Weetman v.*  
 26 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
 27 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

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1 It is the role of the trier of fact, not this court, to  
2 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
3 evidence supports more than one rational interpretation, the court  
4 may not substitute its judgment for that of the Commissioner.  
5 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
6 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
7 substantial evidence will still be set aside if the proper legal  
8 standards were not applied in weighing the evidence and making the  
9 decision. *Brawner v. Secretary of Health and Human Services*, 839  
10 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
11 evidence to support the administrative findings, or if there is  
12 conflicting evidence that will support a finding of either  
13 disability or nondisability, the finding of the Commissioner is  
14 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
15 1987).

## ALJ'S FINDINGS

17 The ALJ found at step one that Plaintiff has not engaged in  
18 substantial gainful activity since her alleged onset date, October  
19 19, 2001. (AR 17). At step two, the ALJ determined that  
20 Plaintiff has the severe impairments of history of hip and lumbar  
21 fractures, cervical strain, scoliosis and degenerative disc  
22 disease of the lumbar spine, but that she does not have an  
23 impairment or combination of impairments listed in or medically  
24 equal to one of the Listings impairments. (AR 18-19).

25 The ALJ concluded that Plaintiff has the residual functional  
26 capacity ("RFC") to perform light exertion level work, with  
27 additional restrictions. (AR 19). He found that Plaintiff is  
28 able to perform light work but she is limited to standing and

1 walking for no more than 30 to 60 minutes at a time. (AR 19-20).  
2 At step four of the sequential evaluation process, the ALJ found  
3 that, based on Plaintiff's RFC, she could perform her past  
4 relevant work as a music dubber as previously performed. (AR 22-  
5 23). Accordingly, the ALJ determined at step four of the  
6 sequential evaluation process that Plaintiff was not disabled  
7 within the meaning of the Social Security Act. (AR 23-24).

8    ISSUES

9    Plaintiff contends that the Commissioner erred as a matter of  
10 law. Specifically, she argues that:

- 11    1. The ALJ erred by rejecting the opinions of Plaintiff's  
12 treating physician, Robert M. Burton, M.D.; and  
13    2. The ALJ erred by failing to provide clear and convincing  
14 reasons for rejecting Plaintiff's testimony.

15    This Court must uphold the Commissioner's determination that  
16 Plaintiff is not disabled if the Commissioner applied the proper  
17 legal standards and there is substantial evidence in the record as  
18 a whole to support the decision.

19    DISCUSSION

20    **A. Treating Physician**

21    Plaintiff contends that the ALJ improperly rejected the  
22 opinions of treating physician Robert M. Burton, M.D. (Ct. Rec.  
23 12-1, pp. 14-17). In a disability proceeding, the treating  
24 physician's opinion is given special weight because of his  
25 familiarity with the claimant and the claimant's physical  
26 condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir. 1989).  
27 To reject the treating physician's opinion, the ALJ must state  
28 specific, legitimate reasons that are supported by substantial

1 evidence. *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d  
2 1453, 1463 (9<sup>th</sup> Cir. 1995); *Fair*, 885 F.2d at 605. If  
3 uncontradicted by other medical opinions, the treating physician's  
4 opinion may not be rejected unless the ALJ provides clear and  
5 convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
6 1995). The Commissioner responds that the ALJ properly rejected  
7 the disability findings and limitation opinions of Dr. Burton by  
8 providing clear and convincing reasons supported by substantial  
9 evidence. (Ct. Rec. 18, pp. 12-18). The undersigned agrees.

10 Dr. Burton indicated in an August 12, 2002 letter to  
11 Plaintiff's attorney at the time that Plaintiff would not be able  
12 to sustain work activity day in and day out, eight hours per day,  
13 five days a week, without absences greater than two days per  
14 month. (AR 286). Dr. Burton indicated in this letter that he  
15 believed Plaintiff was disabled according to the definitions  
16 employed by the Social Security Administration. (AR 286).

17 On March 25, 2004, Dr. Burton filled out a form provided by  
18 Plaintiff's attorney at the time. (AR 456-457). Dr. Burton  
19 indicated in the space provided on the questionnaire that  
20 Plaintiff was not able to sustain light or sedentary work. (AR  
21 457). Dr. Burton stated that Plaintiff's diagnoses were  
22 persistent pelvic, pubic, and sacral fracture pain, diabetes,  
23 fibromyalgia, asthma, and poor tolerance of psychological stress,  
24 her symptoms consisted of persistent pain and fatigue worsened by  
25 stress, and the objective medical findings upon which his  
26 diagnoses were based were "x-rays, labs, BP, etc." (AR 456).

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1       On May 25, 2004, Dr. Burton again filled out a questionnaire  
2 form provided by Plaintiff's attorney at the time. (AR 472-473).  
3 Dr. Burton indicated that he based his diagnoses on a March 1996  
4 sacral MRI as well as other films in Dr. McNabb's possession. (AR  
5 472). Dr. Burton opined that, as a result of Plaintiff's  
6 impairments, she could not sustain standing or walking from more  
7 than 30 to 60 minutes throughout an eight hour workday. (AR 473).  
8 He further opined that she was not capable of light work for  
9 physical reasons and that she does not have the background  
10 experience, temperament or psychological hardiness suitable for  
11 the demands of sedentary work. (AR 473). Yet, Dr. Burton also  
12 answered that Plaintiff was able to lift and carry objects  
13 weighing up to 20 pounds. (AR 473).

14       On October 12, 2004, Dr. Burton filled out another form  
15 provided by Plaintiff's counsel. (AR 478). Dr. Burton indicated  
16 on this questionnaire that Plaintiff could stand 30 to 60 minutes  
17 at one time and twice total for a maximum of two hours in an eight  
18 hour work day. (AR 478). He additionally opined that Plaintiff  
19 could walk five to 10 minutes at one time, with a maximum of 90  
20 minutes in an eight hour work day. (AR 478).

21       The ALJ rejected Dr. Burton's RFC opinions noting that he was  
22 very non-specific about supporting objective medical evidence, his  
23 opinions were provided by merely checking a form with little  
24 substantiation, and the opinions were vocationally based. (AR  
25 20).

26       As noted by the ALJ, Dr. Burton was "very non-specific about  
27 citing any objective medical findings" to support his conclusions.  
28 (AR 20). On the March 25, 2004 questionnaire form, Dr. Burton

1 stated that the objective medical findings upon which his  
2 diagnoses were based were "x-rays, labs, BP, etc." (AR 456). On  
3 the May 25, 2004 form, Dr. Burton indicated that he based his  
4 diagnoses on a March 1996 sacral MRI as well as "other films in  
5 Dr. McNabb's possession." (AR 472). These vague references to  
6 medical evidence fail to support Dr. Burton's severe limitation  
7 findings.

8 An ALJ may discredit a treating physician's opinion that is  
9 conclusory, brief, and unsupported by the record as a whole or by  
10 objective medical findings. *Batson v. Commissioner of Social*  
11 *Security Administration*, 359 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2004) (ALJ  
12 properly gave minimal weight to a treating physician's opinion,  
13 because it was based on the claimant's subjective complaints  
14 without objective evidence, was conclusionary in the form of a  
15 check-list, and lacked substantive medical findings to support her  
16 conclusion); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir.  
17 2001) (ALJ properly rejected a treating physician's opinion  
18 because it was unsupported by rationale or treatment notes and  
19 offered no objective medical findings to support the existence of  
20 the claimant's alleged conditions).

21 The x-rays of which Dr. Burton cited apparently refers to a  
22 June 7, 2001 x-ray which revealed an "old healed" pubic fracture,  
23 mild degenerative disc disease and mild scoliosis.<sup>1</sup> (AR 270).  
24 The March 19, 1996 MRI revealed several sacral fractures; however,  
25 the MRI was performed over 10 years ago and soon after Plaintiff's

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27 <sup>1</sup>It is significant to note that, with regard to the June 7, 2001 x-ray,  
28 Plaintiff's treating physician, Craig D. McNabb, M.D., indicated that he  
really did not see any acute pathology from the x-ray. (AR 260). He  
recommended that she continue working and not change her current treatment  
plan. (AR 260).

1 car accident. (AR 273). These records do not document functional  
2 limitations stemming from the injuries, Dr. Burton does not cite  
3 objective evidence obtained from his own examinations in support  
4 of the functional limitations he found, and the injuries did not  
5 prevent Plaintiff from continuing to work, as she continued to  
6 work until October 19, 2001. (AR 163). Dr. Burton failed to  
7 provide adequate objective medical evidence to substantiate the  
8 conclusory opinions he gave on the questionnaire forms.

9 The ALJ also noted that in the March 25, 2004 questionnaire,  
10 Dr. Burton merely checked the form, marking "No" in response to  
11 questions as to whether Plaintiff could sustain light or sedentary  
12 work. (AR 20, 457). A check-box form is entitled to little  
13 weight. *Crane v. Shalala*, 76 F.3d 251, 253 (9<sup>th</sup> Cir. 1996)  
14 (stating that the ALJ's rejection of a check-off report that did  
15 not contain an explanation of the bases for the conclusions made  
16 was permissible). Dr. Burton failed to adequately explain the  
17 bases for the severe functional limitation he described.

18 Dr. Burton's conclusions that Plaintiff is disabled and  
19 unable to perform light or sedentary level work is also not  
20 supported by the weight of the evidence of record. On June 7,  
21 Plaintiff's treating physician, Craig D. McNabb, M.D., saw  
22 Plaintiff for consultation for low back pain. (AR 259-260). Dr.  
23 McNabb indicated that he did not see any acute pathology from the  
24 x-rays that were performed and recommended that she continue with  
25 work. (AR 260). On February 18, 2002, Plaintiff was examined by  
26 K. Clair Anderson, M.D. (AR 248-251). Dr. Anderson indicated  
27 that Plaintiff had no significant objective findings and opined  
28 that Plaintiff does not have a major orthopedic problem of the

1 spine. (AR 251). On June 10, 2002, a medical consultant, Marin  
2 Kehrli, M.D., reviewed the record and indicated that Plaintiff  
3 retains the capacity for at least medium level work. (AR 285).  
4 A physical residual functional capacity assessment form was filled  
5 out by a state agency reviewing physician, Sharon Eder, M.D., on  
6 October 10, 2002. (AR 398-405). The reviewing physician opined  
7 that Plaintiff could occasionally lift and carry 20 pounds,  
8 frequently lift and carry 10 pounds, stand and/or walk and sit  
9 about six hours each in an eight hour workday, push and pull  
10 without restriction and had postural limitations which  
11 occasionally limited her. (AR 399-400).<sup>2</sup> Dr. McNabb examined  
12 Plaintiff on July 7, 2003 for continuing low back pain. (AR 413-  
13 414). Dr. McNabb recommended a long-acting narcotic medication to  
14 treat her pain, but did not mention any functional limitations as  
15 a result of Plaintiff's complaints of back pain. (AR 414). On  
16 January 4, 2005, John Place, M.D., examined Plaintiff, reviewed  
17 July 2003 x-rays, and conducted new x-rays of Plaintiff's pelvis  
18 and hips. (AR 495-496). Dr. Place indicated that the x-rays  
19 showed evidence of an old healed superior and inferior pubic ramus  
20 fracture on the right, and a pubic fracture of the left, with an  
21 intact pelvic rim and normal relationship at the sacroiliac  
22 joints. (AR 495). The hip joints were normal and symmetrical.  
23 (AR 495). Dr. Place noted that Plaintiff's hip joints were both  
24 normal in appearance on x-ray, and her hip motion was essentially  
25 symmetrical. (AR 496). He advised Plaintiff "to remain active  
26 and encouraged in walking, exercise, etc." (AR 496). No other

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28 <sup>2</sup>It is significant to note that, in her October 2002 report, Dr. Eder  
indicated that Plaintiff was working 22 hours per week and was "last seen  
4/02 in Ortho w/o problems to back." (AR 403).

1 physician of record has opined that Plaintiff is disabled or as  
2 physically limited as described in the questionnaire forms  
3 completed by Dr. Burton.

4 Finally, it was additionally proper for the ALJ to reject Dr.  
5 Burton's opinion as vocationally-based. Although a physician may  
6 make statements regarding what a Plaintiff can still do despite  
7 her impairments and her physical or mental restrictions, the final  
8 responsibility for deciding the issue of disability is reserved to  
9 for the Commissioner. A statement by a medical source that a  
10 claimant is "disabled" or "unable to work" does not mean that the  
11 Commissioner will determine that a claimant is disabled as defined  
12 by the Social Security Act. 20 C.F.R. § 416.916(e)(1). Opinions  
13 concerning the ultimate issue of disability are reserved for the  
14 Commissioner.

15 It is the responsibility of the ALJ to determine credibility,  
16 resolve conflicts in medical testimony and resolve ambiguities.  
17 *Saelee v. Chater*, 94 F.3d 520, 522 (9<sup>th</sup> Cir. 1996). The Court  
18 thus has a limited role in determining whether the ALJ's decision  
19 is supported by substantial evidence and may not substitute its  
20 own judgment for that of the ALJ even if it might justifiably have  
21 reached a different result upon de novo review. 42 U.S.C. §  
22 405(g). In any event, the Court finds that the ALJ thoroughly  
23 analyzed the evidence of record (AR 17-22) and provided clear and  
24 convincing reasons for rejecting Dr. Burton's opinions that  
25 Plaintiff was severely limited from a physical standpoint and  
26 disabled. The ALJ did not err by rejecting the opinions of Dr.  
27 Burton in this case.

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1       **B. Plaintiff's Credibility**

2           Plaintiff also argues that the ALJ erred by failing to  
3 provide clear and convincing reasons for rejecting her testimony.  
4 (Ct. Rec. 12-1, pp. 17-19). The Commissioner responds that, based  
5 on Plaintiff's daily activities, work history and the objective  
6 medical evidence, the ALJ properly determined that Plaintiff's  
7 testimony was unconvincing. (Ct. Rec. 18, pp. 6-12).

8           It is the province of the ALJ to make credibility  
9 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
10 1995). However, the ALJ's findings must be supported by specific  
11 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
12 1990). Once the claimant produces medical evidence of an  
13 underlying impairment, the ALJ may not discredit her testimony as  
14 to the severity of an impairment because it is unsupported by  
15 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
16 1998) (citation omitted). Absent affirmative evidence of  
17 malingering, the ALJ's reasons for rejecting the claimant's  
18 testimony must be "clear and convincing." *Lester v. Chater*, 81  
19 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). In this case, the ALJ found that  
20 Plaintiff's allegations regarding her limitations were not totally  
21 credible. (AR 21-23).

22           The ALJ indicated that Plaintiff's description of limited  
23 daily activities was inconsistent with the record evidence. (AR  
24 21). It is well-established that the nature of daily activities  
25 may be considered when evaluating credibility. *Fair*, 885 F.2d at  
26 603. As noted by the ALJ, Plaintiff testified that each day she  
27 spends four to five hours doing her housework. (AR 21, 68). She  
28 stated that she continues to do vacuuming, sweeping, laundry and

1 dishwashing. (AR 21, 68). The ALJ also noted a May 2001 report  
2 which indicated that Plaintiff performs household chores weekly,  
3 works doing laundry and was taking care of a nine-month old child.  
4 (AR 21, 242). As noted by the Commissioner, the work-like nature  
5 of Plaintiff's daily activities was particularly relevant because  
6 Plaintiff alleged she could no longer perform similar activities.  
7 (Ct. Rec. 18, pp. 8-9). It was entirely proper for the ALJ to  
8 consider Plaintiff's reported daily activities when evaluating  
9 Plaintiff's credibility.

The ALJ also noted that Plaintiff's allegation of disability was inconsistent with the medical reports of record. (AR 21). As noted in Section A, on June 7, 2001, Dr. McNabb indicated that he did not see any acute pathology from the x-rays that were performed and recommended that she continue with work. (AR 260). On February 18, 2002, Dr. Anderson indicated that Plaintiff had no significant objective findings and opined that Plaintiff does not have a major orthopedic problem of the spine.<sup>3</sup> (AR 251). On June 10, 2002, Dr. Kehrli, reviewed the record and indicated that Plaintiff retains the capacity for at least medium level work. (AR 285). A physical residual functional capacity assessment form filled out by a state agency reviewing physician on October 10, 2002, indicated that Plaintiff could occasionally lift and carry 20 pounds, frequently lift and carry 10 pounds, stand and/or walk and sit about six hours in an eight hour workday, and push and

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<sup>3</sup>The ALJ noted that Dr. Anderson's examination revealed that Plaintiff had a normal gait and a level pelvis, she was able to heel/toe walk normally, her motor power was intact and her reflexes were equal and symmetrical. (AR 21).

1 pull without restriction. (AR 399). As noted by the ALJ, Dr.  
 2 McNabb's July 7, 2003 examination revealed that Plaintiff was able  
 3 to ambulate about the medical office and that she had good  
 4 strength throughout her lower extremities. (AR 21, 413). On  
 5 January 4, 2005, Dr. Place noted that Plaintiff's hip joints were  
 6 both normal in appearance on x-ray, and her hip motion was  
 7 essentially symmetrical. (AR 496). He advised Plaintiff to  
 8 remain active and encouraged her to walk and otherwise exercise.  
 9 (AR 496). The weight of the medical evidence of record is simply  
 10 inconsistent with Plaintiff's claim of disabling limitations.

11 Lastly, the ALJ indicates that Plaintiff's work history  
 12 erodes her claim of a physical inability to perform work  
 13 activities. (AR 21). An ALJ may consider a claimant's work  
 14 record as a factor when evaluating credibility. *Light v. Social*  
 15 *Security Administration*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997); *Smolen*  
 16 *v. Chater*, 80 F.3d 1273, 1284 (9<sup>th</sup> Cir. 1996). As noted by the  
 17 ALJ, while Plaintiff alleges debilitating pain has existed since  
 18 her 1995 motor vehicle accident, she continued to work as a  
 19 janitor until at least October of 2001.<sup>4</sup> (AR 21). Plaintiff  
 20 described this work as consisting of cleaning buildings for eight  
 21 hours a night, standing/walking for the majority of the shift,  
 22 carrying and lifting trash six times a night, and mopping and  
 23 vacuuming for at least two-thirds of her shift. (AR 21-22, 164).  
 24 The ALJ found it difficult to believe that Plaintiff had the  
 25 degree of pain alleged but was still able to perform at this level  
 26 of physical exertion. (AR 21).

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 28       <sup>4</sup>The Commissioner points out that, although Plaintiff asserts that she  
           required frequent rest during her shift, whatever rest Plaintiff needed, it  
           did not detract from her ability to work competently for a period of many  
           months. (Ct. Rec. 18, pp. 9-10).

The ALJ is responsible for reviewing the evidence and resolving conflicts or ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400 (1971). The Court has a limited role in determining whether the ALJ's decision is supported by substantial evidence and may not substitute its own judgment for that of the ALJ even if it might justifiably have reached a different result upon de novo review. 42 U.S.C. § 405(g). After reviewing the record, the undersigned finds that the ALJ appropriately specified clear and convincing reasons for finding that Plaintiff's allegations were not fully credible in this case.

## **CONCLUSION**

Having reviewed the record and the ALJ's conclusions, this Court finds that the ALJ's decision that Plaintiff is capable of performing a modified light level of physical exertion work, including her past job as a music dubber, is supported by substantial evidence and free of legal error. Plaintiff is thus not disabled within the meaning of the Social Security Act.

Accordingly,

**IT IS ORDERED:**

23                   1. Plaintiff's Motion for Summary Judgment (Ct. Rec.  
24 12) is DENIED.

25                   2. Defendant's Motion for Summary Judgment (Ct. Rec.  
26 17) is GRANTED.

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3. The District Court Executive is directed to enter judgment in favor of Defendant, file this Order, provide a copy to counsel for Plaintiff and Defendant, and CLOSE this file.

**DATED** this 29<sup>th</sup> day of December, 2006.

s/Michael W. Leavitt  
MICHAEL W. LEAVITT  
UNITED STATES MAGISTRATE JUDGE